Supreme Court, U.S.
FILED
96 721 NOV 6 1996
OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1996

JOHN DOE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KASE & DRUKER, ESQS.
Attorneys for Petitioner John Doe
James O. Druker
Counsel of Record
1325 Franklin Avenue
Garden City, New York, 11530
(516) 746-4300

James O. Druker, Esq.
Paula Schwartz Frome, Esq.
Of Counsel

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

32 pp

QUESTIONS PRESENTED

Did the Second Circuit correctly apply 18 U.S.C. §3742, rather than 28 U.S.C. §1291, in reviewing the extent of reduction of Mr. Doe's previously-imposed sentence pursuant to the Government's motion for reduction under Rule 35(b) of the Federal Rules of Criminal Procedure?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the District Court's action in reducing Mr. Doe's sentence by only five years resulted in a violation of the cooperation agreement between Mr. Doe and the Government, because the District Court refused to give appropriate weight to third-party cooperation rendered through Mr. Doe?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the reduction of the sentence of Mr. Doe of only five years resulted in a disproportionally high sentence for him, because his sentence was only four years less than that ultimately imposed upon his considerably more culpable, and less cooperative, co-defendant?

Should the Second Circuit have remanded this matter for further consideration of the Government's Rule 35(b) motion where the District Court committed errors of law and fact in deciding the appropriate reduction in Mr. Doe's sentence?

PARTIES TO THE PROCEEDING

The parties to this proceeding are John Doe and the United States of America. Although there were other defendants on the indictment, they were not parties in the Court of Appeals and have not been party to this proceeding.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATION TO DECISION 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 16

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit dated August 21, 1996 ..... A1

Appendix B — Statutory Provisions A5

TABLE OF AUTHORITIES

Pages

Cases

Santobello v. New York, 404 U.S. 257 (1971) 12

United States v. Carbone, 739 F.2d 45 (2d Cir. 1984)... 12

United States v. Crooper, 42 F.3d 755 (2d Cir. 1994)... 14

United States v. Doe, F.2d (2d Cir. 1996) 1, 10

United States v. Gangi, 45 F.3d 28 (2d Cir. 1995)..... 10

United States v. Joyner, 924 F.2d 454 (2d Cir. 1991) ... 10

United States v. Lawal, 17 F.3d 560 (2d Cir. 1994)..... 10

United States v. McAndrews, 12 F.3d 273 (1st Cir. 1993)..... 9, 10

United States v. Rexach, 896 F.2d 710 (2d Cir. 1990) *cert. denied* 498 U.S. 969..... 12

United States v. Rueda, 19 F.3d 3 (11th Cir. 1994)..... 12

United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir. 1993) 12

United States v. Shonubi, 998 F.2d 84 (2d Cir. 1993)... 14

United States v. Yesil, 991 F.2d 1527 (11th Cir. 1992) .. 13

Statutes and Other Authorities

18 U.S.C. §3742..... 8, 9, 10, 11

28 U.S.C. §1254(1) 1

28 U.S.C. §1291..... 8, 9, 11

Federal Rules of Criminal Procedure
Rule 35(b) ..... i, 3, 4, 7, 8, 9, 10, 11, 12

U.S.S.G. §5K1.1..... 10

In the

Supreme Court of the United States

October Term, 1996

JOHN DOE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITATION TO DECISION

The decision below is entitled *United States v. Doe*, ___ F.2d ___ (2d Cir. 1996).

JURISDICTIONAL STATEMENT

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The decision in the case was rendered on August 21, 1996 (Appendix "A", *infra*).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES TO BE INCLUDED

18 U.S.C. §3742; 28 U.S.C. §1291, Rule 35(b) of the Federal Rules of Criminal Procedure (Appendix "C", *infra*).

STATEMENT OF THE CASE

John Doe, along with several others, was indicted for cocaine-related offenses on December 21, 1991. On November 12, 1992, Mr. Doe pled guilty to one count of conspiracy to possess cocaine with intent to distribute, and was sentenced, under the guidelines, to a sentence of imprisonment of 16 years.

Mr. Doe had become involved in the enterprise herein because he was married to the sister of one of his co-defendants. This co-defendant was in the hierarchy of one of the Colombian drug organizations. Despite the family connections, Mr. Doe did not become involved in the criminal organization until his wife's substantial medical bills made the lure of large amounts of money too tempting for him to resist. He began as an "errand boy," but ultimately became more involved. Indeed, Mr. Doe admitted that he accepted the offer of employment knowingly, and ultimately became involved, for a short period, in the hierarchy of the criminal organization. His role was described in the pre-sentence report as follows:

> [John Doe] has been identified as the brother-in-law to defendant and leader of the New York operation of this organization .... He is also considered to be a supervisor in their hierarchically structured organization. Although

> considered a supervisor, [Doe] operated at the direction of [another person]. As a worker for [this other person], the defendant [Doe] was in charge of the distribution of cocaine to the Organization's Dominican customers.

Mr. Doe was arrested shortly after he began his role in the organization. His indictment, conviction, and sentence followed, as set forth above.

On October 18, 1993, the Government moved, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, for reduction of Mr. Doe's sentence, based upon his post-sentence cooperation, and anticipated continued cooperation, with the Federal Government regarding narcotics and other cases. It requested that the decision on that motion be deferred so that Mr. Doe could continue his cooperation. It was agreed that, because Mr. Doe and his co-defendants were incarcerated at the time of the agreement, and would remain incarcerated during the period of cooperation, they would be given credit, not only for their direct, personal cooperation, but for cooperation by any third parties whom they were able to persuade to come forward on their behalfs.

For the next two years, Mr. Doe provided significant cooperation, as documented by the Government, both personally and through third party intermediaries.

Personally, Mr. Doe cooperated in two investigations, which led to two indictments: *United States v. Catacoli* and *United States v. Megia*. In both of those cases, Mr. Doe's efforts resulted in guilty pleas by the defendants. In addition, Mr. Doe persuaded another informant to come forward and cooperate on Mr. Doe's behalf. This informant provided

information which led to important cases, and significant seizures of money and narcotics, not only in the New York metropolitan area, but across the country. Both the agents who worked with Mr. Doe and the United States Attorney ultimately stated that Mr. Doe's cooperation was of the highest value. They were satisfied that he did all that he could do in this vein.

After receiving some of the letters which detailed Mr. Doe's cooperation, and that of some of the other co-defendants in this case, the Court began to express personal reservations about the use of third-party cooperation in support of a Rule 35(b) motion. As to Mr. Doe, the Government stated that he had brought forward a person who otherwise would not have cooperated, and that the effort to bring him forward resulted in personal risk to Mr. Doe. Moreover, Mr. Doe's counsel pointed out that Mr. Doe, who was incarcerated during the entire period of his cooperation, could not have done any more than he did in bringing forward the information he had, and developing new information "by proxy,"

However, the Court continued to be bothered by the concept of third party cooperation. On December 8, 1995, the Court resentenced Richard Roe (a co-defendant) on the Government's Rule 35(b) motion regarding him. Mr. Roe was considerably more culpable than Mr. Doe, having originally been sentenced to 27 years imprisonment, 11 years more than Mr. Doe. In deciding that motion the Court first reduced Mr. Roe's sentence due to a retroactive reduction in the guidelines. The Court went on to note its distaste for third party cooperation, stating:

> Unfortunately, this is not a case in which I have much confidence in some to the people who have made representations on behalf of the United States, because the willingness to take third party cooperation, not in Mr. [Roe's] situation but in the case of some of the other co-defendants, is — I mean, for me to label it disturbing is to put it in the best possible light.

The Court further noted that it had grave misgivings about the quality of Mr. Roe's cooperation, stating:

> I have questions in my mind about how valuable this cooperation was. After all, you simply agreed to testify against the transportation wing of the [subject] organization group of people you were involved in. I have no reason to think that you broke any new ground, but I'll view this in the most positive light and accept the representation that it was significant. I'll also accept the fact that there was some benefit from third party cooperation. I still think that a significant sentence is warranted in your case.

The Court then proceeded to reduce Mr. Roe's sentence from 27 to 15 years.

At Mr. Doe's sentence, the Court heard counsel for both Mr. Doe and the Government talk about the sincerity and the fruitfulness of the efforts which Mr. Doe provided. In addition, the Federal Agents were available, in Court, to inform the Court about Mr. Doe's cooperation.

However, although conceding that Mr. Doe's cooperation was "substantial," the Court stated that it was concerned about Mr. Doe's original role in the operation. It stated:

> Mr. [Doe], the one thing I'd urge you to do is not kid yourself. Whether you liked it or didn't like it at the start, you ran the New York operation here.

In fact, as set forth above, Mr. Doe did not run the New York operation. Although Mr. Doe does not dispute that he had a supervisory role, the Court apparently overestimated the size of Mr. Doe's role in considering whether to reduce his sentence.

In addition, the Court continued to be concerned about and discuss its distaste for third-party cooperation. The Court stated:

> Before I sentence the defendant, let me say this to those who have taken advantage of the third party cooperation here. I recognize that it resulted in significant forfeitures, seizures and arrests. But what an impressive informant to be able to put all of this together, and how fortunate for him that I guess he basically got a walk for all of this, because I assume that nobody thinks I'm naive enough to think that he just started in drug trafficking when he came to you all to cooperate. And lo and behold, why is he not being used anymore? Because everybody suspects he's double dealing.

> Yesterday I sentenced a defendant who was convicted after trial. In his past, he had been a third party cooperator for somebody else, and you know what he did when he was a cooperating third party? He shot a cop. The Government's use of these third party cooperators, especially people like this, is fairly labeled, and as I've told the Government in the past, morally bankrupt. But I don't hold that against Mr. [Doe]. He did what he could do, and I seek to give him the benefit of that.

Thereafter, the Court reduced Mr. Doe's sentence from 16 years to 11 years.

Mr. Doe then requested reconsideration of the sentence. He pointed out that Mr. Roe had his sentence reduced from 27 years to 15 years. Mr. Roe had been far more culpable than Mr. Doe and, at his sentence, as quoted above, the Court had harbored grave doubts about how valuable his cooperation was. However, Mr. Roe's sentence was cut nearly in half. On the other hand, Mr. Doe, who was recognized to have been less culpable to begin with, in that his sentence was originally eleven years less than that of Roe, and whose cooperation was deemed to be the best and most truthful of the cooperators, received a much smaller reduction of his sentence. The Court declined to award any further reduction. It should further be noted that Mr. Roe provided virtually no first party cooperation, in contrast to Mr. Doe, whose first party cooperation was significant.

Mr. Doe appealed the results of the Rule 35(b) motion to the Second Circuit Court of Appeals. He contended that the

Circuit Court should review the District Court's decision to reduce his sentence only five years pursuant to the provisions of 28 U.S.C. §1291, rather than the more limited review available under 18 U.S.C. §3742. He further contended that the Lower Court made an error of law in refusing to reduce his sentence more than 5 years, because it violated the cooperation agreement by refusing to credit third-party cooperation appropriately. Mr. Doe further stated that the District Court made an error of fact in his sentence, because it erroneously believed that he "ran the New York organization." Finally, Mr. Doe contended that the decision on the motion regarding him and the motion regarding Mr. Roe resulted in a disproportion between Mr. Doe's sentences and that of his co-defendants, especially Mr. Roe.

The Second Circuit reviewed the case under 18 U.S.C. §3742, and dismissed the appeal.

REASONS FOR GRANTING THE WRIT

The major reason asserted by the petitioner for the granting of the writ is that there is a conflict between the First Circuit on the one hand, and the Second, Fourth, Ninth and Eleventh Circuits on the other hand, regarding whether an appeal from a motion under Rule 35(b) of the Federal Rules of Criminal Procedure is governed by 18 U.S.C. §3742 or by 28 U.S.C. §1291. The First Circuit has held that appellate review of the denial of a Rule 35(b) motion, or of a contention of inadequacy of the reduction of the sentence, is governed by the broader appellate jurisdiction found in 18 U.S.C. §1291. In this case, the Second Circuit explicitly disagreed, and found such review

to be governed by the more limited grounds set forth in 18 U.S.C. §3742, like the review of a sentence.

In *United States v. McAndrews*, 12 F.3d 273 (1st Cir. 1993), the First Circuit held that an appeal of a reduction of sentence under Rule 35(b) was an appeal from a challenge to a final order, governed by 18 U.S.C. §1291. It stated:

> By definition, a sentence must already have been imposed before Rule 35(b) can be invoked and a sentence reduction contemplated. It follows that the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. §3742 because such on order is not, properly speaking, a sentence. [footnote omitted]. Rather, appealability in such circumstances, like appealability with respect to the disposition of virtually all other post-judgment motions, is governed by 28 U.S.C. §1291. 12 F.3d at 277.

In his appeal herein, Mr. Doe urged that the appeal be governed by 28 U.S.C. §1291, and that the Court review for abuse of discretion, as well as for violation of law, the adequacy of the reduction granted Mr. Doe. However, the Second Circuit held 18 U.S.C. §3742 to be applicable to the instant appeal, stating:

> Both positions are, in a literal sense, possible. We do not believe that the question of whether a reduction of a sentence under Rule 35(b) is a sentence or a judgment can be adequately resolved by analyzing its text in a vacuum. Our finding that §3742 applies to appeals of Rule

> 35(b) motions is predicated instead on the similarity between Rule 35(b) and §5K1.1 of the Sentencing Guidelines.
>
> This circuit has found that "[t]he only practical difference between Rule 35(b) and U.S.S.G. §5K1.1 is a matter of timing: [5K1.1] is based on substantial assistance before sentencing while [Rule 35(b)] is based on substantial assistance after sentencing." *United States v. Gangi*, 45 F.3d 28,30 (2d Cir. 1995) (citation omitted). It is settled in this circuit that appeals of §5K1.1 orders are governed by §3742. *See United States v. Lawal*, 17 F.3d 560, 562 (2d Cir. 1994). We have been given no reason why Rule 35(b) motions should be governed by a different standard. *United States v. Doe, supra.*

That very argument was rejected by the First Circuit in *United States v. McAndrews, supra.* It stated:

> The analogy [between Rule 35(b) and §5K1.1] has certain superficial attraction because both mechanisms operate to bring a defendant's sentence below the guideline sentencing range and entail similar judicial inquiries .... But on closer perscrutation, the analogy fails because it overlooks a jurisdictionally significant difference between downward departures and sentence reductions. *Id.* at 276.

Thus, at this point, the standard of review for a Rule 35(b) motion depends upon the Circuit in which the appear is heard.

The First Circuit will hear the appeal for abuse of discretion, as well as for statutory error of law; the Second Circuit review, as well as that in the Fourth, Ninth and Eleventh, will be much more circumscribed. This Court is the only Court which can resolve this issue.

It will be Mr. Doe's contention to this Court that appeals of the denial of Rule 35(b) motions should be governed by 28 U.S.C. §1291. When it enacted the guidelines, Congress also amended Rule 35(b) to eliminate the making, by defendants, of Rule 35(b) motions to reduce sentence. Under the new Rule 35(b), only the Government could move for reduction for post-sentencing cooperation. The obvious reason for this was to encourage post-sentence cooperation. In this amendment, Congress did not specifically make the provisions of 28 U.S.C. §3742 applicable to an appeal from those motions, which it clearly could have done. The Circuits which have applied §3742, reasoning by analogy, have curtailed the ability of defendants to appeal the results of the Government's Rule 35(b) motions without any specific Congressional warrant. Given the importance of the right to appeal, its curtailment should not be so casually allowed.

In addition, Mr. Doe will argue, on appeal, that under an appropriate review, the Second Circuit should have remanded the case for reconsideration of the motion because of an error of law. The District Court violated the agreement between the parties by its refusal to consider third-party cooperation appropriately, made a mistake of fact in sentencing Mr. Doe, and created a sentence which was disproportionately harsh in comparison with Mr. Doe's more culpable co-defendants. For those reasons, the sentence should have been set aside.

When the agreement was made between the Government and Mr. Doe, as well as between the Government and his co-defendants, it was explicitly agreed that third-party cooperation would be considered as a factor in the reduction of Mr. Doe's sentence. Mr. Doe, thereafter, cooperated directly and through an intermediary. His cooperation was extremely fruitful.

The cooperation agreement, as a plea agreement, is interpreted by this Court, and the Courts of Appeals, in the same manner that a contract is interpreted. *Santobello v. New York*, 404 U.S. 257, 262-263 (1971); *United States v. Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir. 1993); *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990) *cert. denied* 498 U.S. 969. Thus, a defendant who has fully performed his part in the agreement is entitled to have the promise inducing it fulfilled. *United States v. Carbone*, 739 F.2d 45 (2d Cir. 1984).

In this case, after Mr. Doe had fully performed his agreement, the promise which induced the cooperation was unfulfilled. Although the Government made a recommendation based upon Mr. Doe's third party and personal cooperation, the Court allowed its own distaste for third party cooperation to influence its reduction of Mr. Doe's sentence. Because the promise was not fulfilled, Mr. Doe is entitled to relief since the Court, as well as the Government, is obligated to give appropriate attention to the promise. In *United States v. Rueda*, 19 F.3d 3 (11th Cir. 1994), the District Court had granted the defendant only a five-week downward departure on the Government's Rule 35(b) motion, and refused to hold a hearing regarding the scope of the

defendant's cooperation. The Eleventh Circuit reversed, holding this to have denied the defendant the benefit of his plea agreement. See also *United States v. Yesil*, 991 F.2d 1527 (11th Cir. 1992).

Even though the District Court herein paid "lip service" to the concept that it was giving Mr. Doe credit for the cooperation provided, it is clear that the Court actually *punished* Mr. Doe unfairly for the actions of the informant, over which he clearly had no control. Mr. Doe cooperated whole-heartedly, and provided significant assistance to the Government, according to the Government's own statement. The Government pronounced itself completely satisfied. In addition, although the third-party informant eventually vanished, his prior cooperation was substantial. The reduction of only five years, to eleven years imprisonment, did not take adequate account of that cooperation, and was caused, in part, by the Court's refusal to appropriately credit the third party cooperation to Mr. Doe.

The Sentencing Court further apparently failed to reduce Mr. Doe's sentence sufficiently because it made a factual mistake about his participation in the underlying offense. The Court stated that Mr. Doe "ran the New York operation" for the organization of which he was charged with being a part. However, and as the Government will undoubtedly concede, this was an exaggeration of Mr. Doe's role. He did not run the New York operation. Although he was considered a supervisor, and was sentenced as one, he actually worked under the supervision of another of the defendants herein, and was only in charge of selling to the Dominican customers of the organization. Thus, there were many layers of culpability

greater than Mr. Doe's, up to the person who *actually* ran the New York operation and beyond. This was also recognized in the lesser original sentence of Mr. Doe in comparison with most of the other defendants in the "package plea" deal worked out. Where a sentence is based upon a mistake of fact, the defendant is entitled to a resentence. *United States v. Crooper*, 42 F.3d 755 (2d Cir. 1994); *United States v. Shonubi*, 998 F.2d 84 (2d Cir. 1993). Here, where the resentence was founded, in part, upon a significant mistake of fact, Mr. Doe should similarly be resentenced.

Finally, Mr. Doe's sentence should be reduced because a comparison between the sentence given to Mr. Roe, and the sentence given to Mr. Doe, demonstrates that Mr. Doe's sentence is disproportionately harsh.

Originally, the sentences in this case were meted out in a hierarchical arrangement, where the length of the sentence was a reflection of the relative culpability of the defendants. In this hierarchy, Mr. Roe was sentenced to 16 years.

At the time of Mr. Roe's sentence, the Court expressed reservations about the scope of Mr. Roe's cooperation, stating:

> I have questions in my mind about how valuable this cooperation was. After all, you simply agreed to testify against the transportation wing of the [criminal] organization group of people you were involved in. I have no reason to think that you broke any new ground, but I'll view this in the most positive light and accept the representation that it was significant. I'll also accept the fact that there was some benefit from third party

> cooperation. I still think that a significant sentence is warranted in your case.

However, in spite of this, Mr. Roe's sentence was reduced from 27 years to 15 years, a reduction of 44%.[1]

In contrast, the Court should have had no reservations about the value of Mr. Doe's cooperation. All of the cooperation resulted in new accusations and new indictments. However, the Court reduced Mr. Doe's sentence only 5 years, to eleven years, a reduction of only 31%. Thus, at this point, the remaining disparity between Mr. Roe's sentence and Mr. Doe's sentence is only 4 years.

While it is clear that a numerical analysis of years in jail is somewhat arbitrary, it is instructive to look at the sentences numerically in order to demonstrate the disproportionality. Thus, for example, Mr. Roe received a reduction in his sentence of nearly one-half, while Mr. Doe received a reduction in his sentence of less than one-third. In addition, when the sentences were originally pronounced, Mr. Doe's sentence was 59% of Mr. Roe's. As reduced, the sentence is now 73% of Mr. Roe's. Thus, although Mr. Doe was originally less culpable, and cooperated to considerably greater effect, he received a reduction which was proportionally much less than that of Mr. Roe, and is now compelled to serve

---

[1] Part of the reduction was due to a retroactive change in the guidelines, which would bring Mr. Roe's maximum sentence down three years, to 24 years. However, this does not change the fact that the ultimate reduction in Mr. Roe's case was 12 years, while Mr. Doe received a 5 year reduction.

proportionally more time than Mr. Roe. This disparity should be corrected.

It should be noted that this case in not controlled by *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991). In that case, the Second Circuit found that disproportionality between co-defendants which was *caused* by guidelines calculations would not be an adequate basis for a downward departure, because this was a factor adequately taken into account by the guidelines. Here, the departure was already taken for reasons which the guidelines allow, and the disproportionality is a result of improper use of those factors. Therefore, it should be corrected by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

KASE & DRUKER, ESQS.
1325 Franklin Avenue
Garden City, New York 11530
(516) 746-4300
Counsel for Petitioner John Doe

PAULA SCHWARTZ FROME, ESQ.
JAMES O. DRUKER, ESQ.
Of Counsel

APPENDIX A — Opinion of the United States Court of Appeals for the Second Circuit, dated August 21, 1996

United States Court of Appeals

For the Second Circuit

No. 1905—August Term, 1995

(Argued: August 8, 1996 Decided: August 21, 1996)

Docket No. 96-1081

United States of America,

Appellee,

—v.—

John Doe,

Defendant-Appellant

Before: Meskill, Calabresi, and Parker,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Raggi, *J.*) reducing defendant's prison term from sixteen to eleven years pursuant to the government's Rule 35(b) motion. Appeal dismissed.

James O. Druker, Kase and Druker,
(Paula Schwartz Frome, Of Counsel),
for Defendant-Appellant.

Zachary W. Carter, U.S. Attorney, E.D.N.Y.,
(Susan Corkery, Eric D. Bernstein, Of Counsel),
for Appellee.

PER CURIAM:

On June 24, 1992, Doe pleaded guilty to a one-count indictment charging him with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A), 846. On November 6, 1992, the district court sentenced Doe to a sixteen-year term of imprisonment. After his guilty plea, Doe began to cooperate with the government. On October 18, 1993, the government filed a motion to reduce Doe's sentence under Fed. R. Crim. P. 35(b). Such a motion filed by the government within one year of the imposition of the original sentence allows the district court to reduce the sentence for substantial assistance rendered to the government after sentencing. The parties do not contest that Doe provided significant assistance, personally and through third-party intermediaries, both before the submission of the motion and for two years following it. On January 19, 1996, the court reduced Doe's sentence from sixteen to eleven years based on the 35(b) motion. Doe appeals the extent of that reduction.

The defendant's appeal raises a question of first impression in this circuit—whether an appeal from a 35(b) motion is governed by 18 U.S.C. § 3742 (which confers limited appellate jurisdiction over appeals of otherwise final sentences) or by 28 U.S.C. § 1291 (which grants broad appellate jurisdiction over appeals of final decisions of district courts). We find that § 3742 applies. Because the defendant's appeal does not fall within the narrow appellate jurisdiction

provided for by that statute, we dismiss the appeal for lack of jurisdiction.

As an initial matter, we note that other circuits have split on this issue. The First Circuit has held that § 1291 governs an appeal of a 35(b) motion, *United States v. McAndrews*, 12 F.3d 273 (1st Cir. 1993), while the Fourth, Ninth, and Eleventh Circuits have held that § 3742 applies, *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1994); *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995); *United States v. Chavarria-Herrara*, 15 F.3d 1033 (11th Cir. 1994) The First Circuit rested its holding solely on the fact that "an order resolving a Rule 35(b) motion... is not, properly speaking, a sentence," because "a sentence must already have been imposed before Rule 35(b) can be invoked and a sentence reduction contemplated." *McAndrews*, 12 F.3d at 277. The Eleventh Circuit, however, found the First Circuit's reasoning "unpersuasive," stating that: "We have noted before that modification of a sentence is part of the sentencing process." *Chavarria-Herrara*, 15 F.3d at 1035-36 (citation omitted).

Both positions are, in a literal sense, possible. We do not believe that the question of whether a reduction of a sentence under Rule 35(b) is a sentence or a judgment can be adequately resolved by analyzing its text in a vacuum. Our finding that § 3742 applies to appeals of rule 35(b) motions is predicated instead on the similarity between Rule 35(b) and § 5K1.1 of the Sentencing Guidelines.

This circuit has found that "[t]he only practical difference between Rule 35(b) and U.S.S.G. § 5K1.1 is a matter of timing: [§ 5K1.1] is based on substantial assistance before sentencing while [Rule 35(b)] is based on substantial

assistance after sentencing." *United States v. Gangi*, 45 F.3d 28, 30 (2d Cir. 1995) (citation omitted). It is settled in this circuit that appeals of § 5K1.1 orders are governed by § 3742. See *United States v. Lawal*, 17 F.3d 560, 562 (2d Cir. 1994). We have been given no reason why Rule 35(b) motions should be governed by a different standard. On the contrary, allowing a 35(b) motion to be governed by the more lenient requirements of § 1291 would "have the deleterious effect of encouraging defendants to postpone their assistance to the Government to manipulate the timing of the motion in order to receive a more favorable standard of review." *Pridgen*, 64 F.3d at 149.

Having determined that § 3742 applies, we must consider whether that statute's narrow grant of jurisdiction allows us to hear the appeal in the instant case. We have § 3742 to cases in which the sentence imposed was "(1) in violation of the law; (2) a misapplication of the Guidelines; (3) an upward departure from the Guidelines; or (4) a plainly unreasonable penalty for an offense not included in the Guidelines." *Lawal*, 17 F.3d at 562; see 18 U.S.C. § 3742(a). The case before us does not fall under any of these exceptions.

Because we find that § 3742 governs appeals of 35(b) motions, and that the defendant's appeal does not fall within the limited jurisdiction conferred by § 3742, we dismiss the appeal for want of jurisdiction.

APPENDIX B — STATUTORY PROVISIONS

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release that the maximum established in the guideline range, or includes a more limiting condition of probation or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence

imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as result of a incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside of the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further

sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a sentence by a magistrate.—An appeal of the otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

Rule 35. Correction or Reduction of a Sentence

(b) Reduction of Sentence for Changed Circumstances. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce

a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

Supreme Court, U.S.
FILED
JAN 8 1997
CLERK

(2)

No. 96-721

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether the appeal of a district court's ruling on a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35(b) is governed by 28 U.S.C. 1291 or by 18 U.S.C. 3742.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

United States v. *Angiulo*, 57 F.3d 38 (1st Cir. 1995)	11
United States v. *Arishi*, 54 F.3d 596 (9th Cir. 1995)	9, 10
United States v. *Chavarria-Herrara*, 15 F.3d 1033 (11th Cir. 1994)	9, 10
United States v. *Lee*, 46 F.3d 674 (7th Cir. 1995)	11
United States v. *Manella*, 86 F.3d 201 (11th Cir. Cir. 1996)	9
United States v. *McAndrews*, 12 F.3d 273 (1st Cir. 1993)	10, 11, 12
United States v. *Pridgen*, 64 F.3d 147 (4th Cir. 1994)	9, 10

Statutes and rules:

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987:	
§ 213(a), 98 Stat. 2011	9
§ 215(b), 98 Stat. 2015	9
18 U.S.C. 3742	7, 8, 9, 10, 11
21 U.S.C. 846	2
28 U.S.C. 1291	8, 9, 10, 11
Fed. R. Crim. P.:	
Rule 11(e)(1)(C)	2
Rule 35(b)	2, 3, 5, 7, 8, 9, 10, 11, 12

Rules—Continued: Page

Sentencing Guidelines § 5K1.1 ..... 8, 10

Miscellaneous:

S. Rep. No. 225, 98th Cong., 2d Sess. (1983) 10

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-721

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 93 F.3d 67.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1996. The petition for a writ of certiorari was filed on November 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess

cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 16 years' imprisonment, to be followed by a life term of supervised release, and fined $500,000. On the government's motion to reduce petitioner's sentence pursuant to Fed. R. Crim. P. 35(b), petitioner was resentenced to 11 years' imprisonment, to be followed by a life term of supervised release, and fined $500,000. The court of appeals dismissed petitioner's appeal of his sentence for lack of jurisdiction. Pet. App. A1-A4.

1. Petitioner was a high-ranking lieutenant in the New York cell of an international drug trafficking organization based in Cali, Colombia, that distributed cocaine in New York, Miami, Houston, Los Angeles, and Chicago. The cell had more than 18 members, including petitioner, who was the brother-in-law of the leader of the organization's New York operations. Petitioner operated under the direction of one of his co-defendants but also directed the activities of various subordinate members of the cell. Petitioner supervised the distribution of cocaine to the organization's Dominican customers, the collection of money from those customers, and the transportation of the money to the organization's various "stash" locations. As a supervisor, petitioner was aware of the cell's money laundering activities. Pet. 2-3; Gov't C.A. Br. 3-4.

2. On June 24, 1992, petitioner pleaded guilty to conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Under a plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(C), the government stipulated that petitioner should

receive a sentence of 16 years' imprisonment.[1] On November 6, 1992, the district court accepted petitioner's plea agreement and sentenced petitioner to 16 years' imprisonment, to be followed by a life term of supervised release, and a fine of $500,000. Pet. App. A2; Gov't C.A. Br. 4-5.

After his guilty plea, petitioner and three co-defendants began to cooperate with the government. On October 18, 1993, the government filed a motion to reduce petitioner's sentence under Fed. R. Crim. P. 35(b), and the district court agreed to hold the motion in abeyance until petitioner's cooperation was complete.[2] On April 15, 1994, the government supplemented its motion and outlined the assistance provided by petitioner. The government informed the court that petitioner had personally agreed to cooperate in a separate case against another significant

---

[1] Based upon the 1,500 kilograms of cocaine attributable to petitioner and his role in the drug trafficking organization, the presentence report determined that petitioner's Sentencing Guidelines range was 360 months' to life imprisonment. Gov't C.A. Br. 4-5.

[2] In pertinent part, Federal Rule of Criminal Procedure 35(b) provides:

> (b) Reduction of Sentence for Changed Circumstances. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. * * * The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

cocaine trafficker, who had pleaded guilty in part because of petitioner's willingness to testify against him. It also informed the court that petitioner had arranged the cooperation of a third-party intermediary. That individual had provided information that in one case had led to the conviction of a defendant who had been arrested in possession of 21 kilograms of cocaine and in another case had led to the arrest and conviction of three defendants who were caught with 90 kilograms of cocaine. Gov't C.A. Br. 5-6.

Over the next 20 months, the government periodically advised the district court about the cooperation provided by petitioner and his third-party intermediary. At a status conference on December 2, 1994, the court generally advised petitioner and the three co-defendants that it did not give as much weight to cooperation by a third-party intermediary as it did to direct cooperation by a defendant. The court also asked the government to submit an assessment of the value of the cooperation provided by petitioner and the three co-defendants. On March 9, 1995, the government advised the court that the cooperation of petitioner's third-party intermediary had produced results of substantial benefit to the government. At a status conference on March 31, 1995, the court directed the government to provide more detailed information concerning the cooperation by petitioner's third-party intermediary. Gov't C.A. Br. 6-10. On January 9, 1996, the government reported that investigations based on the third-party intermediary's information had resulted in the seizure of more than 100 kilograms of cocaine, the seizure of more than $1 million in drug proceeds, guns, and cars, and the convictions of approximately 40 individuals. The government also advised the court that petitioner had

personally agreed to cooperate in a second case against a money launderer, who had pleaded guilty after being informed that petitioner was willing to testify against her. Gov't C.A. Br. 11-12.

Meanwhile, on December 8, 1995, the district court resentenced co-defendant Richard Roe pursuant to the government's motion to reduce his sentence under Rule 35(b). At Roe's first sentencing, the presentence report determined under the Sentencing Guidelines that his sentencing range was 360 months' to life imprisonment, and he was sentenced to 27 years' imprisonment. Because of a retroactive change in the guidelines that took effect after Roe's sentencing, the district court determined at Roe's resentencing that Roe's sentencing range should have been calculated as 235-293 months' imprisonment. After noting that Roe's cooperation consisted primarily of direct cooperation, the court resentenced Roe to 15 years' imprisonment. Gov't C.A. Br. 11.

3. On January 19, 1996, the district court resentenced petitioner pursuant to the government's motion to reduce his sentence under Rule 35(b). Because of the retroactive change in the Sentencing Guidelines that took effect after petitioner's sentencing, the district court determined that petitioner's correct sentencing range was 235-293 months' imprisonment. After noting that petitioner's original 16-year (192-month) sentence was below the minimum guideline range sentence, the court stated that "the question is whether there should be a further departure in light of both the direct and third party assistance that's been provided to the Government." Gov't C.A. Br. 12; C.A. App. 76.

The district court continued to express "reservations" about the value of third-party cooperation, but

it stated that it was "prepared to consider some further reduction in [petitioner's] sentence." Gov't C.A. Br. 13; C.A. App. 76. Petitioner's counsel emphasized to the court that petitioner had also provided direct first-party cooperation in two separate cases. Gov't C.A. Br. 13; C.A. App. 77-78. The court concluded:

> All right. Mr. [Doe], I take seriously everything that the parties have said about the fact that you've done everything you could in this case. Now, I think you've been in court on other occasions when I've expressed some concerns about whether what somebody else does should be credited to the defendant, but I am going to give you some credit for it. I don't view it as the same as what one does oneself, but in your case you also did render some personal cooperation. And I think I can fairly call the totality of your efforts substantial, so that I can reduce your sentence.
>
> You do understand that you were sentenced severely because you were involved in a very destructive criminal organization. And you played a significant role in that organization. I accept the fact that you may have gotten led into all of this through your family ties. For a while, that profited you, and I'm sure that all of you who were involved welcomed the ability to live a comfortable life as a result of your conduct. But that conduct destroyed various families and people.

Gov't C.A. Br. 13; C.A. App. 81-82. With respect to his drug trafficking activity, petitioner told the court: "I had never wanted to do that, and I had never liked

doing it, because I don't like that kind of activity." Gov't C.A. Br. 13-14; C.A. App. 83. The court responded:

> Mr. [Doe], the one thing I urge you to do is not kid yourself. Whether you liked it or didn't like it at the start, you ran the New York operation here. Now, you did it under the leadership of other people more significant than yourself, but you didn't just run an errand on one occasion for these people. You were involved day in, day out, at a top level of a major drug organization. That's why you were sentenced severely.

Gov't C.A. Br. 14; C.A. App. 83. The court acknowledged that the cooperation by petitioner's third-party intermediary had "resulted in significant forfeitures, seizures, and arrests." Gov't C.A. Br. 14; C.A. App. 84. The court again expressed its strong displeasure with the government's use of such third parties, but it concluded: "But I don't hold that against [petitioner]. He did what he could do, and I seek to give him the benefit of that." Gov't C.A. Br. 14; C.A. App. 84. The court resentenced petitioner to 11 years' imprisonment. Gov't C.A. Br. 14; C.A. App. 84-85.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A1-A4. It observed that petitioner's appeal from the district court's reduction of his sentence under Rule 35(b) "raise[d] a question of first impression in this circuit—whether an appeal from a 35(b) motion is governed by 18 U.S.C. § 3742 (which confers limited appellate jurisdiction over appeals of otherwise final sentences) or by 28 U.S.C. § 1291 (which grants broad appellate jurisdiction over appeals of final decisions of district courts)." Pet. App. A2. The court held that

"§ 3742 applies," but it noted that "other circuits have split on this issue." *Id.* at A2-A3. The court explained that its "finding that § 3742 applies * * * is predicated * * * on the similarity between Rule 35(b) and § 5K1.1 of the Sentencing Guidelines." *Id.* at A3. The court observed that Section 3742 governs an appeal from a district court's reduction of sentence under Guidelines § 5K1.1, which applies to a defendant's substantial assistance before sentencing. Because the "only practical difference between Rule 35(b) and [Guidelines] § 5K1.1 is a matter of timing," the court saw "no reason why Rule 35(b) motions should be governed by a different standard." Pet. App. A3-A4 (internal quotation marks omitted). Because "[petitioner's] appeal [did] not fall within the limited jurisdiction conferred by § 3742," the court "dismiss[ed] the appeal for want of jurisdiction." *Id.* at A4.

ARGUMENT

Petitioner contends (Pet. 8-11) the court of appeals erred in holding that 18 U.S.C. 3742, rather than 28 U.S.C. 1291, governs the appeal of a district court's ruling on a motion for reduction of sentence pursuant to Rule 35(b).[3]

---

[3] In pertinent part, 18 U.S.C. 3742 provides:

> (a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sen-

Contrary to petitioner's contention, the court of appeals' decision, which is consistent with decisions of the Fourth, Ninth, and Eleventh Circuits, is correct. See *United States* v. *Pridgen*, 64 F.3d 147, 148-150 (4th Cir. 1994); *United States* v. *Arishi*, 54 F.3d 596, 597-599 (9th Cir. 1995); *United States* v. *Chavarria-Herrara*, 15 F.3d 1033, 1035-1036 (11th Cir. 1994); see also *United States* v. *Manella*, 86 F.3d 201, 202-203 (11th Cir. 1996). As those courts have explained, a defendant's appeal of a district court's ruling on a motion by the government to reduce his sentence under Rule 35(b) involves an appeal of "an otherwise final sentence" within the meaning of 18 U.S.C. 3742(a). *United States* v. *Pridgen*, 64 F.3d at 149; *United States* v. *Arishi*, 54 F.3d at 598; *United States* v. *Chavarria-Herrara*, 15 F.3d at 1035-1036. Moreover, Rule 35 was substantially amended by Congress when Section 3742 was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 213(a), 215(b), 98 Stat. 2011, 2015. At that time, Congress clearly indicated that appeals from rulings

---

tence includes a greater fine or terms of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

In pertinent part, 28 U.S.C. 1291 provides:

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *, except where a direct review may be had in the Supreme Court.

on Rule 35 motions should be governed by Section 3742. See S. Rep. No. 225, 98th Cong., 2d Sess. 158 (1983) (Rule 35 was amended "in order to accord with the provisions of proposed section 3742 of title 18 concerning appellate review of sentences"); see also *United States* v. *Pridgen*, 64 F.3d at 149; *United States* v. *Arishi*, 54 F.3d at 598-599; *United States* v. *Chavarria-Herrara*, 15 F.3d at 1036 & n.5. And, as the court of appeals explained in this case, it is clear that Section 3742 governs an appeal from a sentence when a defendant claims that a district court should have reduced his sentence (or should have reduced it further) under Sentencing Guidelines § 5K1.1 based on a defendant's substantial assistance to the government before sentencing. Because the "only practical difference between Rule 35(b) and [Guidelines] § 5K1.1 is a matter of timing," the court correctly concluded that there is "no reason why Rule 35(b) motions should be governed by a different standard." Pet. App. A3-A4 (internal quotation marks omitted); see also *United States* v. *Pridgen*, 64 F.3d at 149.

As petitioner points out (Pet. 8-11), the First Circuit reached a contrary conclusion in *United States* v. *McAndrews*, 12 F.3d 273, 276-279 (1st Cir. 1993), in holding that it had jurisdiction under 28 U.S.C. 1291 "to hear a timely appeal in which a prevailing defendant complains that the district court acted too grudgingly in dispensing relief under Rule 35(b)." 12 F.3d 279. The First Circuit reasoned that "the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. § 3742 because such an order is not, properly speaking, a sentence." *Id.* at 277 (footnote omitted). It also noted that "an order resolving a Rule 35(b) motion satisfies the preconditions established by section 1291, for entry of

the order leaves nothing further to be done." *Ibid.* The First Circuit concluded that "[a]n order granting or denying a Rule 35(b) motion is, thus, a final decision for purposes of section 1291." *Ibid.*[4]

Although there is a conflict between the First Circuit and the other courts of appeals over the question presented in this case, further review by this Court is unwarranted at this time. Because the First Circuit was the first court of appeals to decide the question in *McAndrews*, the court did not have the benefit of the analysis employed by the other courts of appeals in resolving the issue. The First Circuit in *McAndrews*, for example, did not consider the legislative history concerning the interrelationship of the amendment to Rule 35(b) and the enactment of 18 U.S.C. 3742, as did the Fourth and Eleventh Circuits in their subsequent decisions. Since deciding *McAndrews*, the First Circuit has not had occasion to reconsider the question. See *United States* v. *Angiulo*, 57 F.3d 38, 40-41 (1st Cir. 1995) (noting that denial of Rule 35(b) motion was appealable under *McAndrews* but finding that defendant did not file timely notice of appeal). Because the First Circuit may be willing in a future case to reexamine its decision in *McAndrews*

---

[4] In *United States* v. *Lee*, 46 F.3d 674, 677 (7th Cir. 1995), the Seventh Circuit cited the First Circuit's decision in *McAndrews* for the general proposition that a district court's order refusing to grant relief under Rule 35(b) is appealable. The Seventh Circuit did not specifically address the question presented in this case of whether an appeal is available under 28 U.S.C. 1291. Nor is it clear that the outcome of that case—reversal because of the district court's failure to consider the basis for the Rule 35(b) motion (see 46 F.3d at 681)—was affected by the theory under which the court of appeals had jurisdiction.

in light of the contrary decisions of other courts of appeals, this Court's intervention to resolve the conflict would be premature.

In addition, further review is unwarranted because petitioner is not entitled to relief under any standard of review. Cf. *McAndrews*, 12 F.3d at 278 n.9, 279-280 (noting that the district court has discretion in extent of sentence reduction under Rule 35(b) and reviewing district court's failure to grant a hearing on Rule 35(b) motion under an abuse of discretion standard). Petitioner contends (Pet. 11-16) that the district court's failure to reduce his sentence further was improper for three reasons. First, petitioner asserts (Pet. 11-13) that the court violated an agreement between the parties to take into account cooperation provided by the third-party intermediary. The record squarely refutes that assertion. Although the court expressed its displeasure at the government's use of third-party intermediaries, the court repeatedly made clear that it had taken into account the cooperation of the third-party intermediary as a basis for reduction of petitioner's sentence.[5] C.A. App. 76, 81-82, 84.

---

[5] Contrary to petitioner's suggestions (Pet. 3, 12), there was no written "cooperation agreement" between the government and petitioner requiring that petitioner be given credit for the cooperation of any third-party intermediary. Rather, the government orally agreed to file a Rule 35(b) motion if petitioner provided substantial assistance. Gov't C.A. Br. 17. In any event, petitioner has never claimed—nor could he—that the government did not bring to the court's attention the full extent of his direct cooperation as well as the cooperation of his third-party intermediary when it moved to reduce his sentence.

Second, petitioner claims (Pet. 13-14) that the district court made a mistake of fact about his participation in the offense when it stated that he "ran the New York operation" for the organization. The context of that remark, however, reflects that the court fully appreciated petitioner's role in the New York organization. After stating that petitioner "ran the New York operation," the court continued: "Now, you did it under the leadership of other people more significant than yourself, but you didn't just run an errand on one occasion for these people. You were involved day in, day out, at the top level of a major drug organization." Govt. C.A. Br. 14; C.A. App. 83. Neither petitioner nor his counsel objected to that characterization of petitioner's role. In any event, it is clear from those comments that the court was not under the misimpression, as petitioner suggests, that petitioner was the leader of the entire New York cell.

Finally, petitioner contends (Pet. 14-16) that his reduced sentence of 11 years' imprisonment is "disproportionately harsh" in comparison to the sentence of co-defendant Roe, whose term of imprisonment was reduced from 27 years to 15 years. That contention has no merit. A sentencing court is not required to equalize the treatment of co-defendants. In any event, petitioner's claim is inaccurate. Following the retroactive amendment to the Sentencing Guidelines, the sentencing range for both petitioner and Roe was 235-292 months' imprisonment. The difference between Roe's minimum guideline range sentence and the reduced sentence of 15 years he received based on his cooperation was four years and seven months. In comparison, the difference between petitioner's original 16-year sentence—which was below the minimum guideline range sentence even after application of the

retroactive amendment—and his reduced sentence of 11 years was five years. Petitioner therefore has no basis for claiming that his sentence reduction was disproportionately low in comparison to the reduction received by Roe. Accordingly, petitioner's claims merit no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

JANUARY 1997